Tan Sri Dato' Hj Lamin bin Hj Mohd Yunus v Bursa Malaysia Securities Bhd

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R4–25–353 OF 2009
AZIAH ALI J
31 JANUARY 2011

Companies and Corporations — Directors — Board of directors — Public companies — Statutory duties imposed by listing requirements (LR) upon directors — Whether appointment of provisional liquidator absolve directors from their obligations under LR — Capital Markets and Services Act 2007 s 11

Companies and Corporations — Public companies — Listing requirements (LR) — Failure to submit company's annual audited accounts and audited report — Whether amounting an offence committed by directors — Whether appointment of provisional liquidator absolved directors from their obligations under LR — Capital Markets and Services Act 2007 s 11

Companies and Corporations — Public companies — Listing requirements (LR) — Statutory force of LR — Statutory duties imposed by LR upon directors — Whether appointment of provisional liquidator absolve directors from their obligations under LR — Capital Markets and Services Act 2007 s 11

The applicant was an Independent Non-Executive Director of Golden Plus Holdings Berhad ('GPlus'). The respondent is a stock exchange and has statutory duties under s 11 of the Capital Markets and Services Act 2007 ('the CMSA'). The applicant sought judicial review under O 53 of the Rules of the High Court 1980 ('RHC') for an order of certiorari to quash the decision of the respondent's appeals committee dated 2 October 2009 imposing the punishment of public reprimand and fine of RM43,000 on the applicant for breach of the respondent's listing requirements ('LR'). The respondent's listing committee had found that the applicant had breached the LR in failing to submit the company's annual audited accounts and audited report for the financial year ended 31 December 2007, the quarterly report for the financial period ended 31 March 2008 and the quarterly report for the financial period ended 30 June 2008 within the time periods stipulated for their respective submission. The listing committee found that the applicant failed to provide a reasonable explanation or demonstrate adequate efforts taken to discharge his obligations to ensure timely submission of those documents. The appeals committee upheld the decision of the listing committee. The applicant

contended that the decision of the appeals committee was perverse as it was extremely prejudicial to him as well as the other directors of GPlus. According to the applicant, when a provisional liquidator ('PL') was appointed for the company, there was no longer an office of a director. It was submitted that the listing committee and the appeals committee had not appreciated that upon the appointment of the PL, the directors had become functus officio and their powers were assumed by the liquidator as enunciated in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105. It was thus argued that upon the directors being able to perform their duties, the undertaking to ensure compliance with the LR automatically ceased.

Held, dismissing the application with costs:

(1) The LR has statutory force and the duties imposed by the LR upon the applicant are statutory duties in view of the fact that the LR is derived from the CMSA. The appointment of the PL could not by itself, in the absence of any such provision within the CMSA or any other Act, absolve the directors from their obligations under the LR (see paras 18 & 30).

(2) Notwithstanding the appointment of the PL, the board may retain some residuary powers indicating that the office of director is not rendered *functus officio*. The appeals committee had correctly noted the test laid down in *Re Union Accident Insurance Co Ltd* that if the power of the board is power which the PL can be said to have assumed, then to that extent that power is lost. If the power cannot be assumed by the PL, then the board still retains that power (see para 32).

(3) The applicant's solicitors acknowledged in their letter dated 29 May 2008 that the statutory obligations of the directors in relation to the LR and the Companies Act 1965 remained intact and that these statutory duties of the directors cannot be subrogated and/or assigned to the PL. By a letter dated 19 June 2008 the applicant's solicitors confirmed with the respondent that the directors shall continue to act to ensure compliance of the LR. The evidence in the form of the letters issued by the PL did not show that there was any impediment from the PL that could be interpreted to be interference with the directors in the discharge of their obligation to ensure timely submission of the accounts. Insofar as the financial reports related to this case, the PL had indicated that these would be the responsibility of the board. Thus in respect of the financial statements in question the PL had not assumed the responsibility of ensuring timely submission. The evidence showed that the director's undertaking to ensure compliance remained intact and were not frustrated notwithstanding the appointment of the PL (see para 34).

(4) The evidence did not support the applicant's contention that he was helpless and frustrated in discharging his obligation to ensure timely submission of the accounts (see para 34).

(5) An undertaking given by a director of a company pursuant to the listing requirements that he would ensure the company complies with the LR cannot be assigned to the PL. In the absence of any provision within the CMSA or any other Act, the directors are not absolved from the obligations under the LR (see para 35).

(6) The appeals committee had considered all relevant matters and had not considered irrelevant matters. The applicant had failed to demonstrate why the decision of the appeals committee ought to be quashed. The appeals committee had not committed any error of law in making its decision to warrant curial intervention (see para 36).

[Bahasa Malaysia summary

Pemohon merupakan Pengarah Bebas Bukan Eksekutif Golden Plus Holdings Bhd ('GPlus'). Responden merupakan bursa saham dan mempunyai kewajipan statutori di bawah s 11 Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP'). Pemohon memohon semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk perintah certiorari untuk membatalkan keputusan jawatankuasa rayuan responden bertarikh 2 Oktober 2009 memberikan hukuman teguran umum dan denda RM43,000 ke atas pemohon untuk kemungkiran keperluan penyenaraian responden ('KP'). Jawatankuasa penyenaraian responden mendapati bahawa pemohon telah memungkiri KP dengan kegagalan mengemukakan akaun tahunan syarikat yang diaudit dan laporan yang diaudit untuk tahun kewangan yang berakhir 31 Disember 2007, laporan suku tahunan untuk tempoh kewangan yang berakhir 31 Mac 2008 dan laporan suku tahunan untuk tempoh kewangan yang berakhir 30 Jun 2008 dalam rangkuman tempoh masa yang dinyatakan untuk pengemukaan masing-masing. Jawatankuasa penyenaraian mendapati bahawa pemohon gagal untuk memberikan penjelasan yang munasabah atau menunjukkan bahawa usaha yang secukupnya diambil untuk melepaskan kewajipannya untuk memastikan pengemukaan dokumen-dokumen tersebut dalam tempoh wajar. Jawatankuasa rayuan mengesahkan keputusan jawatankuasa penyenaraian. Pemohon menghujahkan bahawa keputusan jawatankuasa rayuan adalah bercanggah kerana ia adalah amat memudaratkan kepadanya dan juga kepada pengarah-pengarah lain GPlus. Menurut pemohon, apabila pelikuidasi provisional ('PL') dilantik oleh syarikat, tidak ada lagi pejabat pengarah. Dihujahkan bahawa jawatankuasa penyenaraian dan jawatankuasa rayuan tidak mengakui bahawa dengan pelantikan PL, pengarah-pengarah telah menjadi *functus officio* dan kuasa mereka diambil alih oleh pelikuidasi seperti yang dijelaskan di dalam kes *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105. Dengan itu dihujahkan bahawa apabila pengarah-pengarah boleh menjalankan tugas mereka, akujanji untuk memastikan pematuhan KP terbatal secara automatik.

Diputuskan, menolak permohonan dengan kos:

(1) KP mempunyai kuasa statutori dan kewajipan yang diletakkan oleh KP

ke atas pemohon adalah kewajipan statutori memandangkan fakta bahawa KP diambil daripada APMP. Pelantikan PL tidak boleh dengan sendirinya, tanpa apa-apa peruntukan di dalam APMP atau Akta lain, membebaskan pengarah-pengarah daripada kewajipan mereka di bawah KP (lihat perenggan 18 & 30).

(2) Meskipun dengan pelantikan PL, lembaga boleh mengekalkan sedikit baki kuasa menyatakan bahawa pejabat pengarah tidak dijadikan *functus officio*. Jawatankuasa rayuan telah dengan betul menggunakan ujian di dalam kes *Re Union Accident Insurance Co Ltd* bahawa jika kuasa lembaga adalah kuasa yang PL boleh dikatakan telah memikulnya, maka setakat itu kuasa tersebut hilang. Jika kuasa tidak boleh dipikul oleh PL maka lembaga masih mengekalkan kuasa itu (lihat perenggan 32).

(3) Peguamcara pemohon mengakui di dalam surat mereka yang bertarikh 29 Mei 2008 bahawa kewajipan statutori pengarah-pengarah tersebut berkaitan dengan KP dan Akta Syarikat 1965 masih kekal tidak terjejas dan kewajipan statutori pengarah-pengarah ini tidak boleh diserahkan dan/atau diserah hak kepada PL. Melalui surat bertarikh 19 Jun 2008 peguamcara pemohon mengesahkan dengan responden bahawa pengarah-pengarah boleh terus bertindak untuk memastikan pematuhan KP. Keterangan dalam bentuk surat-surat yang dikeluarkan oleh PL tidak menunjukkan bahawa terdapat apa-apa halangan daripada PL yang boleh ditafsirkan sebagai campur tangan dengan pengarah-pengarah dalam pelepasan kewajipan mereka untuk memastikan pengemukaan akaun mengikut tempoh. Setakat yang berkaitan dengan laporan kewangan dengan kes ini, PL menyatakan bahawa ini akan menjadi kewajipan lembaga. Dengan itu, berkenaan dengan penyata kewangan yang dipersoalkan PL tidak memikul tanggungjawab untuk memastikan pengemukaan mengikut tempoh. Keterangan menunjukkan bahawa akujanji pengarah untuk memastikan pematuhan tidak terjejas dan tidak dikecewakan walaupun dengan pelantikan PL (lihat perenggan 34).

(4) Keterangan tidak menyokong hujahan pemohon bahawa dia tidak berupaya dan dikecewakan dalam melepaskan kewajipannya untuk memastikan pengemukaan akaun dalam tempoh yang sewajarnya (lihat perenggan 34).

(5) Suatu akujanji yang diberikan oleh seseorang pengarah syarikat berikutan keperluan penyenaraian bahawa dia akan memastikan syarikat mematuhi KP tidak boleh diserah hak kepada PL. Dalam ketiadaan apa-apa peruntukan dalam APMP atau apa-apa Akta lain, pengarah-pengarah tidak boleh dibebaskan daripada tanggungjawab mereka di bawah KP (lihat perenggan 35).

(6) Jawatankuasa rayuan telah mempertimbangkan kesemua perkara relevan dan tidak mengambil kira perkara yang tidak relevan. Pemohon telah

gagal menunjukkan mengapa keputusan jawatankuasa rayuan mesti dibatalkan. Jawatankuasa rayuan tidak melakukan apa-apa kesilapan dari segi undang-undang dalam membuat keputusan yang mewajarkan campur tangan pembetulan (lihat perenggan 36).]

Notes

For cases on companies and corporations in general, see 3(1) *Mallal's Digest* (4th Ed 2011, Reissue) paras 1–1825).

For cases on directors in general, see 3(1) Mallal's Digest (4th Ed 2011, Reissue) paras 150–388).

Cases referred to

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 5 CLJ 698; [2009] 4 MLJ 695; [2009] 1 LNS 349, CA (refd)

Council of Civil Service Union and Ors v Minister for the Civil Service [1984] 1 AC 374 (refd)

Country Traders Distributors Ltd, Re (1974) 2 NSWLR 135 (refd)

Fai Insurance Ltd v Pioneer Concrete Services (No 2) (1986) 10 ACLR 801 (refd)

Mawcon Ltd, Re [1969] 1 All ER 188 (refd)

Union Accident Insurance Co Ltd, Re [1972] 1 All ER 1105, SC (refd)

Legislation referred to

Capital Markets and Services Act 2001 s 11

Companies Act 1965 ss 57(2), 233, 233(1)

Rules of the High Court 1980 O 53

D Paramalingam (Krish Maniam & Co) for the applicant.

Preetha Pillai (Deepa Nambiar with him) (Skrine) for the respondent.

Aziah Ali J:

[1] The applicant is an Independent Non-Executive Director of Golden Plus Holdings Bhd ('GPlus'). The respondent is a stock exchange and has a statutory duty under s 11 of the Capital Markets and Services Act 2007 ('the CMSA') to ensure an orderly and fair market in the securities that are traded through its facilities. To discharge its statutory duty, various rules and requirements are issued, thereafter monitored and enforced by the respondent.

[2] The applicant applies for judicial review under O 53 of the Rules of the High Court 1980 ('RHC') for an order of certiorari to quash the decision of the respondent's appeals committee dated 2 October 2009 imposing the punishment of public reprimand and fine of RM43,000 on the applicant for

breach of the respondent's listing requirements ('LR'). A

BACKGROUND

[3] Paragraph 2.02 of the LR states that all applicants, listed issuers, management companies, trustees, their directors, officers, advisers or other persons must comply with the LR and failure to comply will amount to a breach in respect of which actions may be taken and/or penalties may be imposed. The principles on which the LR are based are amongst others: B

(a) directors, officers and advisers of listed issuers shall maintain the highest standards of integrity, accountability, corporate governance and responsibility; and C

(b) directors of listed issuers shall act in the interests of the company as a whole, particularly where the public represents only a minority of the shareholders or where directors or major shareholders have material interests in transactions entered into by listed issuers. D

[4] The LR relevant to the present case are:

(a) Paragraph 9.22 which stipulates that a listed company must give to the respondent for public release, an interim financial report that is prepared on a quarterly basis, as soon as the figures have been approved by the board of directors of the listed issuer and in any event not later than two months after the end of each quarter of a financial year; E

(b) paragraph 9.23 which stipulates that a listed company must ensure: F

(i) its annual report ('AR') shall be issued to the listed company's shareholders and give to the respondent within a period not exceeding six months from the close of the financial year of the listed company; and G

(ii) its annual audited accounts ('AAA') together with the auditors' and directors' reports shall, in any case, be given to the respondent for public release, within a period not exceeding four months from the close of the financial year of the listed company unless the annual report is issued within a period of four months from the close of the financial year of the listed company; H

(c) paragraph 16.11 which stipulates that a director must not:

(i) cause, aid or abet a breach of these requirements by such listed issuer; or I

(ii) permit either knowingly or where he had reasonable means of obtaining such knowledge, a listed issuer to commit a breach of these requirements;

(d) paragraph 16.17 which sets out the various penalties that may be imposed on the listed company and the directors for breach of the LR.

[5] The respondent's listing committee had found that the applicant has breached para 16.11(b) of the LR for permitting knowingly or where he had reasonable means of obtaining such knowledge GPlus to breach the following provisions of the LR:

(a) Paragraph 9.23(b) of the LR for falling to submit company's annual audited accounts for the financial year ended 31 December 2007 ('AAA 2007') on or before 30 April 2008;

(b) paragraph 9.23(a) of the LR for failing to submit company's annual report for the financial year ended 31 December 2007 ('AR 2007') on or before 30 June 2008;

(c) paragraph 9.22(1) of the LR for failing to submit company's quarterly report for the financial period ended 31 March 2008 ('QR 1/2008') on or before 31 May 2008; and

(d) paragraph 9.22(1) of the LR for failing to submit company's quarterly report for the financial period ended 30 June 2008 ('QR 2/2008') on or before 31 August 2008.

[6] The listing committee found that the applicant has failed to provide a reasonable explanation or demonstrate adequate efforts taken to discharge his obligations to ensure timely submission of the AAA 2007, AR 2007, QR 1/2008 and QR 2/2008. The listing committee imposed on the applicant the penalty of public reprimand and a fine of RM49,500 ('exh TSL4').

[7] On 18 July 2008 the respondent issued to the applicant a notice to show cause by way of written representation supported by documentary evidence as to why the respondent should not find the applicant to be in breach of:

(a) Paragraph 16.11(a) of the LR for causing the company's failure to submit —

(i) the company's annual audited accounts for the financial year ended 31 December 2007 ('AAA 2007') on or before 30 April 2008 and until to date;

(ii) the company's annual report for the financial year ended 31 December 2007 ('AR 2007');

(iii) the company's quarterly report for the financial period ended 31 March 2008 ('QR 1/2008');

(b) paragraph 16.11(b) of the LR for permitting knowingly or where the

applicant has reasonable means of obtaining such knowledge, the company's failure to submit — A

(i) the AAA 2007 to the respondent on or before 30 April 2008 and until to date;

(ii) the QR 1/2008 to the respondent on or before 31 May 2008 and until to date; and B

(iii) the AR 2007 to the respondent on or before 30 June 2008 and until to date.

C

[8] The applicant submitted an appeal through his solicitors vide a letter dated 2 April 2009. By a letter dated 2 October 2009 the applicant was informed that the appeals committee has upheld the decision of the listing committee and the punishment of public reprimand but has reduced the fine to RM43,000 ('exh TSL16'). The applicant contends that the decision of the D appeals committee is perverse as it is extremely prejudicial to him as well as the other directors of GPIus as the decision is wholly inconsistent with prevalent laws.

[9] The reasons put forward in support of this application to quash the E decision of the appeals committee dated 2 October 2009 are as follows:

(a) the appeals committee erred when it agreed with the listing committee which found that the applicant's representations that the directors are *functus officio*, incapacitated and have no powers with the appointment of a provisional liquidator ('PL') and the directors were merely assisting the F PL as unacceptable;

(b) the appeals committee erred when it decided that there is no doubt that the directors have or were able to exert some form of control or influence over the timely preparation of the financial statements with the G permission of the PL and thus the directors' undertakings to ensure compliance with the LR and obligation under para 16.11 (b) of the LR remain intact and were not frustrated;

(c) the appeals committee erred when it decided that the assumption of H responsibility by the PL (vis-a-vis GPLUS) is not inconsistent with or does not absolve the responsibility of the directors to similarly ensure compliance with the LR premised on their personal undertakings to the respondent;

(d) the appeals committee also erred when it formed a view that it is not I unreasonable to arrive at the conclusion as the listing committee that in the mind of the directors they had no doubt at the material time that they must comply with the LR and they have accepted the responsibility/task to finalise the financial statements;

(e) the appeals committee erred when deciding that the amendments to Part E, Appendix 9A of the main market listing requirements is only a disclosure requirement and does not absolve the liability of the directors of GPLUS; and

(f) the appeals committee erred when it decided that it is not necessary for them to make a determination on the issue of residual powers of the directors vis-a-vis preparation and finalisation of the financial statements as the directors were in fact not powerless or incapacitated vis-a-vis preparation and finalisation of the financial statements and the directors have failed to take all reasonable efforts towards proper discharge of their obligations under para 16.11 (b) of the LR in accordance with their undertakings to the respondent.

SUBMISSIONS FOR THE APPLICANT

[10] Counsel for the applicant submits that when a PL was appointed there was no longer an office of a director. It is submitted that the listing committee erred in its interpretation of the principles enunciated in the case of *Re Country Traders Distributors Ltd* (1974) 2 NSWLR 135 as in that case the learned judge had concluded that 'Prima facie, in my opinion, it would be the duty of a liquidator to cause the company to take such steps as might be necessary or appropriate to carry out the obligations imposed upon the company by the terms of s 180G'. Counsel submits that the listing committee had wrongly concluded that a director's power ceases but its office is not abolished. Therefore the appeals committee erred in declining to accept the applicant's representation that there was no longer an office of a director when the PL was appointed.

[11] It is further submitted that having accepted that 'a director's power ceases...', the listing committee and the appeals committee had not further appreciated that upon the appointment of the PL, the directors have become *functus officio* and their powers are assumed by the liquidator as enunciated in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 where Plowman J held (at p 1113):

> It is of course well settled that on a winding up the board of directors of a company becomes functus officio and its powers are assumed by the liquidator and my attention was drawn to *Re Mawcon Ltd*. Where Pennycuick J stated in effect that the appointment of a provisional liquidator had the same result. No doubt that is so, but it is common ground that notwithstanding the appointment of the provisional liquidator the board has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding up order is made, to appeal against that order.

It is submitted that by taking away the power of director, it essentially means that his office has been rendered *functus officio* and as such is incapacitated from carrying out his duties.

[12] Counsel submits that the listing committee and the appeals committee has failed to distinguish the cessation of power from abolishment of office and failed to give due consideration to the dictum in the case of *Re Mawcon Ltd* [1969] 1 All ER 188 as follows:

> that on the appointment of the PL, the powers of the directors to act as such are determined and they could not be revived so long as the PL remained in office.

It is submitted that the listing committee and the appeals committee have failed to consider the fact that if the directors' power cease, it is not an issue whether or not their office is still in existence, the directors will be incapacitated to act.

[13] Counsel further submits that the listing committee and the appeals committee failed to consider the provisions of s 233(1) of the Companies Act 1965 which provides that 'Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or control all the property and things in action to which the company is or appears to be entitled'. It is submitted that the listing status being a chose in action, it is under the custody and control of the PL who shall ensure the preservation of the listing status of GPlus. Thus it is submitted that it is incumbent on the PL to ensure compliance of the LR.

[14] Counsel submits that the listing committee and the appeals committee had placed great reliance on the letter from Messrs Krish Maniam & Co dated 29 May 2008 (exh TSL8) and had read paras 1 and 2 disjunctively. It is submitted that if paras 1 and 2 were read together, it is clear that the directors were of the opinion that their obligation shall be intact provided that they are able to make the announcement in relation to their obligation. Counsel submits that the respondent has wrongly concluded the effect of the said letter. It is submitted that in any event the letter does not override the actual legal position of the directors.

[15] It is further submitted that the listing committee and the appeals committee had failed to direct their mind to the fact that the appointment of the PL has frustrated the effect of the undertaking given by the directors when the company was listed as the undertaking was given based on the directors being able to perform their duties. Upon cessation of such duties, the undertaking to ensure compliance with the LR automatically ceases as well. It is submitted that since an undertaking is a contractual obligation, s 57(2) of the Contracts Act 1965 applies. Section 57 provides as follows:

57 Agreement to do impossible act

(1) An agreement to do an act impossible in itself is void.

(2) Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) ...

[16] For the reasons above stated, counsel submits that the decision of the appeals committee dated 2 October 2009 is clearly erroneous and perverse and an order of certiorari ought to be granted.

SUBMISSIONS FOR THE RESPONDENT

[17] Counsel for the respondent submits that there is no authority to support submissions by counsel for the applicant that 'listing status' comes within the provisions of s 233 of the Companies Act 1965 and therefore the PL is obliged to ensure the preservation of the listing status and compliance of the LR. It is submitted that s 233 does not apply because as a matter of fact the PL had not 'taken into his custody or under his control all the property and things in action to which the company is or appears to be entitled' and had in fact left the matter of preparing and finalising the financial statements to the directors of GPIus.

[18] It is submitted that the LR which is derived from the CMSA has statutory force (s 354 of the CMSA; *Fai Insurance Ltd v Pioneer Concrete Services (No 2)* 1986 10 ACLR 801). Therefore the duties of the directors, ie the applicants herein, under the LR, are in fact statutory duties which are imposed on them as long as the company is listed. The appointment of the PL cannot by itself, in the absence of any such provision within the CMSA or any other Act, absolve the directors from their obligations under the LR.

[19] Before the listing committee, the applicant's counsel submits that there was no longer an office of director when a PL is appointed. Both the listing committee and the appeals committee had given due consideration to *Re Country Traders Distributors Ltd* and had followed the decision in that case which held that on the making of a winding up order, a director's powers cease but his office is not abolished. The listing committee further held that the said case suggests that a liquidator has both the power and duty to cause a company to carry out its statutory obligations which has a public purpose. Mahoney J held:

> ... where a liquidator is appointed by the court to wind up a company and the statute imposes an obligation in terms of s 180G and having the public purpose which is obvious from the nature of that obligation and that obligation is imposed upon the company, then, whatever be otherwise the limits of his power in a particular case, the power of the liquidator extends, in my view, to do whatever is necessary to cause that company to carry out its statutory obligations.

[20] Counsel for the respondent submits that the LR is designed to impose obligations which have a public purpose. The PL could and had in fact asked the directors to GPLUS to assume the responsibility with regard to the timely submission of the financial statements of the company.

[21] It is submitted that under the court order dated 27 March 2008 appointing the PL, the powers of the PL are very wide and include, amongst others, to appoint an agent to do any business which the PL is unable to do himself and to do all such things that are necessary to protect and preserve the assets of GPLUS. Thus the PL could require the directors to finalise the financial statements in respect of the financial period prior to his appointment for issuance. Counsel refers to the PL's letter dated 25 July 2008 to the respondent in which the PL states:

> Upon the appointment of the Provisional liquidator, the directors have no further management powers save for the residual power to oppose the winding up. However, the Provisional Liquidator has the right to appoint any person or continue with the employment of any person to assist in the management of the Company.
>
> Further, the Provisional Liquidator is entitled to require that the directors of the Company deal with all matters arising before the appointment of the Provisional Liquidator as he has no knowledge of the same. An example of this would be the Audited Accounts and Annual Report for the year ending 31 December 2007. The Provisional Liquidator would not be in a position to deal with these as they relate to matters arising before this appointment as Provisional Liquidator.

[22] The PL took the position that the directors of GPLUS maintained their roles with regard to making announcements on behalf of the company. In the PL's letter dated 29 May 2008 to the respondent the PL states as follows:

> With regard to your second query, the Listing Requirements impose an obligation on the directors to disclose to the public all material information necessary for informed investing. Failure to do so will result in a penalty being imposed on the directors. Thus, the Board of Directors continued to make announcements on behalf of G-Plus even after my appointment as Provisional Liquidator.

[23] Counsel submits that the conduct of the directors supports the fact that the directors of GPLUS still maintained their duties to finalise and approve the

audited accounts of the company as confirmed by the directors themselves in their letter dated 19 June 2008 from the applicant's solicitors to the respondent a follows:

> We refer to the above matter and confirm that the 'First Board' shall continue to act to ensure compliance and the 'new Board' shall not be doing so, until determination by the Courts.

Thus it is submitted that applicants themselves held out, not only to the respondent but to the world at large, that they were taking steps to comply with the LR. Having done so, they cannot now when faced with sanction for failing to carry out these duties timeously, take the position that they had no obligation or duty at first instance to comply with the LR post appointment of the PL.

[24] The listing committee and the appeals committee had deliberated upon the opinion of the directors that their obligation shall remain intact provided they are able to make the announcement in relation to their obligation. It is submitted that the listing and appeals committee had correctly read the applicant's solicitor's letter dated 29 May 2008 conjunctively and harmoniously and not disjunctively as stipulated by counsel for the applicant. Based on the representations made by the directors and the PL not only to the respondent but to the world at large that the directors would undertake to comply with their obligations under the LR notwithstanding the appointment of the PL, the appeals committee arrived at the conclusion that the directors undertook the obligations for the preparation of the AAA 2007, AR 2007 and QR 1/2008 as the relevant financial period was before the appointment of the PL.

[25] The facts relied on by the appeals committee in arriving at the conclusion are as set out in para 2.3.3 of the minutes of the appeals committee. There was no indication or representation made that the directors were prevented from taking the necessary steps to enable the timely submission of the financial statements. Notwithstanding the appointment of the PL, the directors continued to make announcements on behalf of the company. The directors continued to meet with external auditors and were clearly involved in the preparation of the audited accounts. Counsel further refers to the legal opinion dated 29 May 2008 from the applicant's solicitors to GPLUS which states amongst others:

(a) the Board of Directors will retain its residual powers in exception to the management operational activities of the company;

(b) the statutory obligations of the directors in relation to any prevailing laws that effect the company shall remain intact;

(c) these statutory obligations are in relation to their obligations as directors pursuant to the Companies Act 1965 and listing requirements. (GPHB being a listed company);

(d) the announcement in relation to the statutory obligations of the company must be made by the directors of the company; and

(e) the statutory duties of the directors cannot be subrogated and/ or assigned to the provisional liquidator.

[26] Based on the foregoing facts and circumstances counsel for the respondent submits that there is no doubt that the directors have or were able to exert some control over the timely preparation of the financial statements with the permission of the PL. Therefore the undertaking of the directors to ensure compliance with the LR and their obligations under the LR remain intact and were not frustrated. Therefore the directors remain liable for their failure to discharge their obligations under para 16.11(b) of the LR. The directors cannot now turn around and say that they do not have an obligation to ensure timely submission of the financial statements.

[27] The appeals committee noted the test laid down in *Re Union Accident Insurance Co Ltd* wherein Plowman J held that notwithstanding the appointment of PL, the board has some residuary powers as follows:

> The issue of the extent of that residuary powers can be helpfully determined by looking at the other side of the coin, namely to enquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator. If the answer is that it cannot, that may be a good reason for saying that the board still retains it.

Based on that test and following confirmations by the PL and the directors therefore the appeals committee found strong grounds to hold that the directors are responsible for the delay in submission of the financial statements.

[28] Counsel for the respondent submits that the question before this court is whether the decision of the appeals committee is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (*Council of Civil service Union and Ors v Minister for the Civil Service* [1984] 1 AC 374). It is submitted that the applicant has failed to demonstrate why the decision of the appeals committee ought to be quash. Counsel refers to the case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 5 CLJ 698; [2009] 1 LNS 349 wherein the Court of Appeal referred to the judicial statement in *R v Securities and Futures Authority ex p Panton* (unreported 20 June 1994) per Sir Thomas Bingham as follows:

> It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under that Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[29] Counsel submits that for the decision of the appeals committee to be amenable to judicial review the applicant must show that the decision made on 2 October 2009 suffers from the infirmities of illegality, irrationality and procedural impropriety. It is submitted that there has been no procedural impropriety in the decision making process nor can it be said that the findings and conclusions are in any way illegal or irrational. Therefore the applicant has failed to prove its case for judicial review.

DECISION

[30] Counsel for the applicants rightly submits that in pursuance of s 11 of the CMSA, the respondent drew up rules as contained in the LR to regulate the conduct and activities of its members. I agree with counsel for the respondent that the LR has statutory force and the duties imposed by the LR upon the applicant are statutory duties in view of the fact that the LR is derived from the CMSA. The appointment of the PL cannot by itself, in the absence of any such provision within the CMSA or any other Act, absolve the directors from their obligations under the LR. Irrespective of whether or not the LR has statutory force the Court of Appeal in *Fai Insurance Ltd v Pioneer Concrete Services* (No 2) Kirby J of the Supreme Court of New South Wales held:

> ... the overall scheme (of the corporations law), as enacted by the Parliament, appears to be one which elevates the listing requirements to a statutory importance which they did not previously have. They are now more than the private rules of a private body... they are given statutory significance, doubtless in recognition of the fact that they necessarily affect large transactions, potentially involve the movement of very considerable funds and concern the public interest as well as the private interests of shareholders.

[31] The case of *Bursa Malaysia Securities Berhad v Gan Boon Aun* [2000] 4 MLJ 695 emphasised that listed companies must comply with the LR as follows:

> A company that is listed in the Official List of the Bursa is governed by listing requirements (LR) that sets out the minimum standards of conduct that *must be complied by listed companies.* (Emphasis added.)

[32] Essentially the applicant contends that upon the appointment of the

PL, the office of director ceases to exist. It is contended that the listing committee came to the wrong conclusion that a director's power ceases but its office is not abolished. The applicant contends that if the directors' power ceases, the undertaking given by the directors when the company was listed to ensure compliance with the LR automatically ceases as well. Taking away the power of director essentially means that his office has been rendered functus officio. I am unable to agree with counsel for the applicant. I agree with counsel for the respondent that notwithstanding the appointment of the PL, the Board may retain some residuary powers indicating that the office of director is not rendered functus officio. The appeals committee has correctly noted the test laid down in *Re Union Accident Insurance Co Ltd* that if the power of the board is power which the PL can be said to have assumed, then to that extent that power is lost. If the power cannot be assumed by the PL, then the board still retains that power.

[33] The applicant contends that pursuant to s 233 of the Companies Act 1965, upon the appointment of the PL it is the PL and not the directors who must ensure compliance with the LR as the PL has custody and control over the property of the company and control over things in action. It is contended that the listing status of the company is an asset of the company and intangible and therefore it is a thing in action. Thus for the company to remain as a listed entity therefore the PL must ensure compliance with the LR. The PL is solely responsible for the submission of accounts and the announcement thereof. It is contended that since the appointment of the PL on 27 March 2008 it is contended that the directors are helpless and frustrated in complying with the LR in respect of the submission of the audited annual accounts as the financial books of the company vests in the PL.

[34] The evidence show that the applicant's solicitors acknowledged in their letter dated 29 May 2008 that the statutory obligations of the directors in relation to the LR and the Companies Act 1965 remain intact and that these statutory duties of the directors cannot be subrogated and/or assigned to the PL. By a letter dated 19 June 2008 the applicant's solicitors confirmed with the Respondent that the directors shall continue to act to ensure compliance of the LR. The evidence in the form of the letters issued by the PL does not show that there was any impediment from the PL that can be interpreted to be interference with the directors in the discharge of their obligation to ensure timely submission of the accounts. Insofar as the financial reports related to this case, the PL has indicated that these would be the responsibility of the board. Thus in respect of the financial statements in question the PL has not assumed the responsibility of ensuring timely submission. The evidence show that the director's undertaking to ensure compliance remain intact and were not frustrated notwithstanding the appointment of the PL. The evidence does not

support the applicant's contention that he is helpless and frustrated in discharging his obligation to ensure timely submission of the accounts.

[35] The respondent drew up rules in the LR in pursuance of s 11 of the CMSA. Hence the obligation to comply with the LR cannot be understated (*Bursa Malaysia Securities Berhad v Gan Boon Aun*). It must be noted that the undertaking in question is an undertaking given by the applicant in his capacity as a director of the company. I am of the view that an undertaking given by a director of a company pursuant to the listing requirements that he would ensure the company complies with the LR cannot be assigned to the PL. As stated by the applicant's solicitors in their letter dated 29 May 2008 ('exh TSL8') the obligations of the directors in relation to the LR remain intact. I agree with counsel for the respondent that in the absence of any provision within the CMSA or any other Act, the directors are not absolved from the obligations under the LR.

[36] A perusal of the decision of the appeals committee dated 2 October 2009 ('exh TSL16') which the applicant seeks to impugn shows that the appeals committee has considered all relevant matters and has not considered irrelevant matters. I agree with counsel for the respondent that the applicant has failed to demonstrate why the decision of the appeals committee ought to be quashed. I find that the appeals committee has not committed any error of law in making its decision to warrant curial intervention. For the reasons stated above the application is dismissed with costs of RM6,000 to the respondent. By consent it was agreed that the decision in this case will bind cases Nos 25–348 of 2009, 25–349 of 2009, 25–350 of 2009, 25–351 of 2009 and 25–352 of 2009. Costs of RM6,000 is also awarded to the respondent in respect of each case.

Application dismissed with costs.

Reported by Kanesh Sundrum